INDEX

	Page
MOTION	(1)
INTERESTS OF THE AMICI	(2)
CONCLUSION	(4)
BRIEF	1
INTERESTS OF THE AMICI	2
ARGUMENT	2
I. Introduction And Summary	2
II. The Language Of The Statute Dictates The Conclusion That The Employer Is A Party To The Dispute Within Section 10(k)	5
III. Considerations Of Industrial Realities Compel The Conclusion That The Employer Be Recognized As A Necessary Party To The Dispute	6
IV. The Contemporaneous Construction Of The Statute By Construction Industry Groups Accords With The Recognition Of The Employer As A Party To The Dispute	10
V. The NLRB's Construction Is Not Inconsistent With the Applicable Legislative History	12
VI. The NLRB's Consistent Administrative Construction For More Than Twenty Years Without Congressional Change Is Entitled To Great Weight And Should Be Affirmed In The Absence, As Here, Of Compelling Reasons To The Contrary	15
A. The NLRB Construction of the Statute in the Circumstances is Entitled to Great Weight	15
B. The Reasoning of the Court Below Does Not Militate Against the NLRB's Construction of the Statute	17
CONCLUSION	25

AUTHORITIES CITED

Cases:	Page
Acoustical Contractors, 119 NLRB 1645 (1957)	12
Boys Markets, Inc. v. *Retail Clerk's Union*, 398 U.S. 235 (1970)	17
Carey v. *Westinghouse Corp.*, 375 U.S. 261 (1964)	5, 21, 22
Int'l Hod Carriers Union, Local 231 (Middle States Tel. Co.), 91 NLRB 598 (1950)	16
Int'l Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.), 82 NLRB 650 (1949)	18
International Union of Operating Engineers, Local 66 (Frank P. Badolato & Sons), 135 NLRB 1392 (1962)	4
Local 450, International Union of Op. Eng. v. *Elliott*, 256 F.2d 630 (5th Cir. 1958)	4
Local 502, Int'l Hod Carriers (Cement-Work, Inc.), 140 NLRB 694 (1963)	20
Local 532, United Brotherhood of Carpenters (D. W. Winkelman Co.), 189 NLRB No. 94 (1971)	4, 16
Local 978, United Brotherhood of Carpenters v. *Markwell*, 305 F.2d 38 (8th Cir. 1962)	15
Local 1291, ILA, 152 NLRB 676 (1965), *enforced*, 368 F.2d 107 (3rd Cir. 1966)	21
Local 1905, Carpet Linoleum Layers (Butcher & Sweeney Constr. Co.), 143 NLRB 251 (1963)	20
Lodge 68 of the Int'l Ass'n of Machinists (Moore Drydock Co.), 81 NLRB 1108 (1949)	18
Los Angeles Bldg. & Constr. Trades Council (Westinghouse Electric Corp.), 83 NLRB 477 (1949)	4, 16
McLaren v. *Fleischer*, 256 U.S. 477 (1921)	16
N.L.R.B. v. *Gullett Gin Co.*, 340 U.S. 361 (1951)	17
N.L.R.B. v. *Local 25, I.B.E.W. (Sarrow-Suburban Elec. Co.)*, 383 F.2d 449 (2nd Cir. 1967)	15
N.L.R.B. v. *Local 25, I.B.E.W.*, 396 F.2d 591 (2nd Cir. 1968)	9, 22-23
N.L.R.B. v. *Local 825, Int'l Union of Op. Eng.*, 326 F.2d 213 (3rd Cir. 1964)	4
N.L.R.B. v. *Local 825, Int'l Union of Op. Eng.*, 410 F.2d 5 (3rd Cir. 1969)	4

Page

N.L.R.B. v. *Radio & Television Broadcast Engineers Union, Local 1212, I.B.E.W. (CBS)*, 364 U.S. 573 (1969) 6
New Orleans Typographical Union No. 17 v. *N.L.R.B.*, 368 F.2d 755 (5th Cir. 1966) 4
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 (1933) 16
Plumbers Local 525, 173 NLRB No. 208 (1968) 21
Quinn v. *N.L.R.B.*, 61 LRRM 2690 (D.C. Cir. 1966) 4
Retail Clerks Local 770 v. *Thrifty Mart*, 59 Cal. 2d 421, 380 P.2d 652 (1963) 21, 24
Retail Clerks Local 428 v. *L. Bloom & Sons*, 173 Cal.App.2d 701, 344 P.2d 51 (1959) 21
Teamsters Local 107 (Safeway Stores, Inc.), 134 NLRB 1320 (1961) 20, 21
Transportation-Communication Employees Union v. *Union Pacific Railroad Co.*, 385 U.S. 157 (1966) 9
Udall v. *Tallman*, 380 U.S. 1 (1965) 16
United Bhd. Carpenters, Local 581 (Ora Collard), 98 NLRB 346 (1952) 4, 16
United States v. *American Trucking Ass'n*, 310 U.S. 534 (1940) 16
Universal Battery Co. v. *United States*, 281 U.S. 580 (1930) 16
Zemel v. *Rusk*, 381 U.S. 1 (1965) 16, 17

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, et seq.):

Section 8(b)(4)(D) 3, 4, 5, 6, 7, 10, 12, 13, 14, 17, 18, 19, 20
Section 10(k) ..... (3), 3, 4, 5, 6, 8, 9, 10, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24
Section 301 7

Miscellaneous: Page

93 Cong. Rec. 1910, 2 LH 982 (1947) 14
93 Cong. Rec. 7000, 2 LH 1624 (1947) 14
H.R. 3020, as passed by the House, 80th Cong., 1st Sess.
Section 2(15), 1 LH 169 (1947) 13
Section 12(a), 1 LH 169 (1947) 13
H.R. 3020, as passed by the Senate, 80th Cong., 1st Sess., p. 81, 1 LH 239 (1947) 13, 14
H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 57, 1 LH 561 (1947) 13
34 NLRB Ann. Rep. 204 (1969) ..... (3), 5, 7
Address by Robert Denham, Associated General Contractors Annual Convention, Feb. 11, 1948 .. 11
Attleson, *The NLRB and Jurisdictional Disputes*, 53 Geo. L. J. 93 (1964) 9
Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389 (1971) 6, 7, 8, 19, 23
Note, *The NLRB and Deference to Arbitration*, 77 Yale L. J. 1191 (1968) 8, 23
Report of President, Building Trades Department, 41st Annual Convention (Nov. 10, 1948) 10
K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION, 45 (1961) 8, 10, 11, 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184 and 1231

No. 1184

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., PETITIONERS,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, the following contractor associations—Associated General Contractors of America, International Association of Wall & Ceiling Contractors, Mason Contractors Association of America, National Roofing Contractors Association, and National Utility Contractors Association—move for leave to file the attached brief amicus curiae in this case. Counsel for the amici have sought the consent of the parties involved: attorneys for the petitioners consented, but the attorneys for respondent refused.

INTERESTS OF THE AMICI

1. The amici here are all national associations representing contractors in various phases of the construction industry. The Associated General Contractors of America ("AGC" herein) represents approximately 9,000 general construction contractors who perform contracts in the amount of approximately $75,000,000,000 per year. The other amici represent approximately 3,000 contractors providing specialized construction, usually as subcontractors, at all kinds of construction projects: the International Association of Wall & Ceiling Contractors represents more than 450 contractors involved in the application of wall and ceiling systems; the Mason Contractors Association represents more than 1500 masonry contractors, who annually perform contracts for masonry construction in excess of $750,000,000; the National Roofing Contractors Association represents 600 contractors who perform the bulk of all roofing construction in the country; and the National Utility Contractors Association represents approximately 400 contractors engaged in the construction of underground utility lines and other utility construction projects.

2. These amici have a particularly vital interest in the issue presented here. The building and construction industry is a highly unionized industry, and is the primary source of strikes involving jurisdictional disputes. Sta-

tistics of the National Labor Relations Board show that during the last fiscal year approximately 66 percent of all unfair labor practice charges in jurisdictional dispute cases arose in the construction industry. 34 NLRB Ann. Rep. 204-205 (1969). Each of the amici and their constituent members have been involved, and currently are involved, in innumerable jurisdictional disputes with various building trades craft unions. The resolution of these disputes are of vital concern to construction industry contractors because their economic existence is to a substantial degree affected by the outcome of these disputes and their speedy resolution.

3. The issue presented in this case is the proper interpretation of the jurisdictional dispute provisions of the National Labor Relations Act. The court below overturned the settled construction of the Act which the NLRB had consistently given for more than 20 years, and held that the NLRB had no authority under Section 10(k) of the Act (29 U.S.C. § 160(k)) to determine a jurisdictional dispute where the unions involved in the dispute had agreed between themselves, and without the agreement or consent of the employer, to be bound by a voluntary method of adjustment of the dispute. Petitioners question the validity of that holding here, contending that the employer must also agree to be bound by any such voluntary adjustment before the NLRB is ousted of jurisdiction.

4. The decision of the court below presents grave problems for construction industry employers. The effect of the court's decision is to place the resolution of all disputes over an employer's work assignments solely in the hands of the unions involved and whatever dispute-settling machinery they wish to establish. In the construction industry, nearly all building trades craft unions are bound to submit such disputes to the National Joint Board, a body created by the Building Trades Department of the AFL-CIO. This Joint Board has consistently sub-

ordinated factors essential to the operation of a contractor's business (economy, efficiency, ability, etc.) to reliance upon ancient and outmoded inter-union agreements or decisions of record, many dated back to the early 1900's. Thus, its decisions do not fairly consider essential managerial considerations, and therefore, fail to reflect economic realities. Despite efforts on the part of the AGC and other employer groups to effect changes in the Joint Board to reflect managerial considerations, the Joint Board has failed to do so. Accordingly, many employer groups (including all of the amici here) have withdrawn from or have refused to participate in the Joint Board plan, and are not stipulated to the current Joint Board. Despite this fact, the court's decision requires employers, whether they are stipulated to the Joint Board or not, to accept its work-assignment resolutions.

5. The amici urge that the court's decision is contrary to the intent of Congress, and reflects the court's misconception of the nature of jurisdictional disputes as understood by Congress and as recognized by industry, employer and union alike, as well. The amici urge that they, as national associations for general contractors, subcontractors, and specialty contractors, and particularly because of the AGC's primary role in the formation and development of the National Joint Board, are uniquely qualified to present the position of the construction industry on the important issue raised in this case.

CONCLUSION

For the foregoing reasons, the amici herein respectfully request the Court to grant this motion for leave to file the attached brief amicus curiae in support of the position of petitioners.

Respectfully submitted,

JOSEPH M. STONE
815 Fifteenth Street, N.W.
Washington, D. C. 20005

GEORGE L. PLUMB
135 South LaSalle Street
Chicago, Illinois 60603

BETTY SOUTHARD MURPHY
Suite 1032, Pennsylvania Building
13th & Pennsylvania Avenue, N.W.
Washington, D. C. 20004

Counsel for the Amici

May 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC., PETITIONERS,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INTERNATIONAL ASSOCIATION OF WALL & CEILING CONTRACTORS, MASON CONTRACTORS ASSOCIATION OF AMERICA, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AND NATIONAL UTILITY CONTRACTORS ASSOCIATION.

INTERESTS OF THE AMICI

This brief is submitted pursuant to Rule 42 of the Rules of this Court, subject to the Court's granting of the attached Motion for Leave to File a Brief as Amicus Curiae. The amici herein support the position of the petitioners in this case, urging reversal of the decision by the United States Court of Appeals for the District of Columbia Circuit.

The interests of the amici are stated in the attached Motion (*supra*, pp. 1-5), and are not repeated herein.

ARGUMENT

THE NLRB'S CONSISTENT CONSTRUCTION OF SECTION 10(k) OF THE ACT TO INCLUDE THE EMPLOYER AS A NECESSARY PARTY TO A JURISDICTIONAL DISPUTE COMPORTS WITH THE CONGRESSIONAL INTENT, THE GENERAL POLICIES OF THE ACT, INDUSTRIAL REALITIES, AND THE CONTEMPORANEOUS CONSTRUCTION THAT INDUSTRY GAVE THAT PROVISION UPON ITS ENACTMENT. THE CONTRARY CONCLUSION BY THE COURT BELOW FAILS TO DISPEL THE REASONABLENESS OF THIS CONSTRUCTION AND THEREFORE MUST BE REVERSED.

I. Introduction And Summary.

The issue presented in this case concerns the proper construction of the statutory provisions of the National Labor Relations Act[1] involving the resolution of jurisdictional or work-assignment disputes. The court of appeals below, overturning the consistent interpretation given by the NLRB since these provisions were added to the statute in 1947, held that whenever the unions involved in a jurisdictional dispute have agreed among

[1] 29 U.S.C. 151, *et seq.*

themselves to resolve the dispute through some form of voluntary adjustment, their resolution of the dispute is controlling for statutory purposes even though the struck employer did not agree or consent to be bound by their resolution of the dispute; thus, under this circumstance, the NLRB is ousted of jurisdiction independently to determine the dispute, and NLRB regulation of further picketing or strikes concerning the dispute must be in accordance with the union's resolution.

The decision of the court below, and the issue presented in this case, turns on the determination of who comprises the "parties" to jurisdictional disputes within the meaning of Section 10(k). That section, and companion Section 8(b)(4)(D), are the jurisdictional dispute provisions of the Act, and must be read together for an understanding of the statutory scheme.

Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to strike or picket to force "any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ."[2]

---

[2] Section 8(b)(4)(D) provides in full:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * * *
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to em-

Section 10(k) provides that whenever an 8(b)(4)(D) charge is filed, the NLRB is

> directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute . . . .

The NLRB has consistently held that the struck employer as well as the competing unions are "parties" to the jurisdictional dispute within the meaning of Section 10(k), and has required the employer to consent to any agreed upon method of voluntary adjustment, along with the unions involved, before it will divest itself of jurisdiction under the abstention provision of 10(k).[3] This consistent construction has been adhered to by the NLRB for more than twenty years, and had been accepted by every court of appeals which had adverted to it.[4] However, the court below rejected this interpretation, holding that it "is not the employer but the rival unions (or other employee groups) who are the parties to the juris-

---

> ployees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

[3] *E.g., Los Angeles Bldg. & Constr. Trades Council (Westinghouse Electric Corp.)*, 83 NLRB 477, 482 (1949); *United Bhd. Carpenters, Local 581 (Ora Collard)*, 98 NLRB 346, 349 (1952); *International Union of Operating Engineers, Local 66 (Frank P. Badolato & Sons)*, 135 NLRB 1392, 1396 (1962); *Local 532, United Brotherhood of Carpenters (D. W. Winkelman Co.)*, 189 NLRB No. 94 (1971).

[4] *N.L.R.B.* v. *Local 825, Int'l Union of Op. Eng.*, 326 F.2d 213, 216 (3rd Cir. 1964); *Local 450, Int'l Union of Op. Eng.* v. *Elliott*, 256 F.2d 630, 635-636 (5th Cir. 1958); *N.L.R.B.* v. *Local 825, Int'l Union of Op. Eng.*, 410 F.2d 5, 9 (3rd Cir. 1969); *New Orleans Typographical Union No. 17* v. *N.L.R.B.*, 368 F.2d 755, 763 (5th Cir. 1966); *Quinn* v. *N.L.R.B.*, 61 LRRM 2690 (D.C. Cir. 1966).

dictional dispute contesting which employees are entitled to seek the work in question" (A. 371). Accordingly, the court held that the NLRB "may not properly proceed to determine a jurisdictional dispute pursuant to Section 10(k) when the disputing unions have agreed to settle their dispute . . . ." (A. 363).

The amici herein urge that the court's construction of the statutory provisions is plain error. The amici show below that the interpretation of the NLRB is consistent with the plain language of the statute and the intent of Congress, reflects industrial realities, and comports with the construction that industry—both employer and union groups alike—placed on the statute when it was enacted. Further, the amici show that, in consideration of all the circumstances here, the NLRB's consistent interpretation is entitled to great weight and should be upheld.

II. The Language Of The Statute Dictates The Conclusion That The Employer Is A Party To The Dispute Within Section 10(k)

The relationship of the pertinent statutory provisions, when read together, plainly shows that the employer as well as the competing employee groups are necessarily "parties" to a jurisdictional dispute within the meaning of Section 10(k). That section comes into play under the statutory language only after a union has struck, or has engaged in some other prohibited coercion, against an employer to force or require a different assignment of work, and the employer, or some other affected party, has filed an unfair labor practice charge under Section 8(b)(4)(D) of the Act. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964).[5] Whenever this occurs, Section 10(k) requires the NLRB to "determine

[5] The employer was the charging party in 535 of 579 charges under Section 8(b)(4)(D) filed in fiscal year 1969. 34 NLRB Ann. Rep. 197 (1969).

the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute" have agreed on a method of adjustment.

The "parties to such dispute" obviously refers to the parties to the "dispute out of which such unfair labor practice shall have arisen"; and the employer is necessarily a party to that dispute because the unfair labor practice does not arise until the union takes coercive action against the employer to compel him to assign the work to its members.[6] Thus, the employer is made a party to the dispute by the very action which makes Sections 8(b)(4)(D) and 10(k) operative; the employer is therefore a "party" to the dispute within the meaning of Section 10(k).

III. Considerations Of Industrial Realities Compel The Conclusion That The Employer Be Recognized As A Necessary Party To The Dispute

Employers involved in jurisdictional disputes, particularly in the construction industry, are vitally concerned with the outcome of work assignment resolutions. "As a practical matter, few employers are totally unconcerned with what group of employees performs the various jobs involved in their business operations."[7] In many circumstances, the employer's economic interests are directly af-

---

[6] Surely, the union would not take such action unless the employer would not comply with the union's request or the union feared that the employer would not. In either case, the union's coercive action shows that at that time it is involved in an active dispute with the employer.

[7] See Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389, 399-400 (1971). There are situations, of course, where the employer is relatively indifferent as to which group of employees performs the work. *E.g., N.L.R.B.* v. *Radio & Television Broadcast Engineers Union (CBS)*, 364 U.S. 573 (1961), where the employer was willing to let either union involved perform lighting work or to divide up the work between the two unions. For the reasons discussed herein, however, such situations are rare.

fected by the determination as to which group is entitled to perform the assignment: indeed, in the construction industry, this determination is often a matter of economic life-or-death for the individual contractor.

In the construction industry, where most jurisdictional disputes occur,[8] a job is usually obtained through competitive bidding, oftentimes highly competitive bidding, and the profit margin for the contractor is narrow.[9] The contractor's bid is carefully based on factors relevant to the employees to whom he contemplates assigning the work —*i.e.*, their wage rates, their efficiency, their ability to perform the work at the desired quality level, the size of the crew required by the group, etc. The award of this work to another group of employees could result in considerably higher costs because of a change in any or all of these factors, and thereby not only eliminate the contractor's profit factor but also seriously jeopardize his financial condition.

Moreover, the award of the work to another group of employees could even lead to the contractor's losing the contract and to interference with stable labor relations. For example, if, as is often the case, the contractor has a collective bargaining agreement with a union covering particular work and he accordingly assigns the work to that union pursuant to the agreement, an award of the work to a stranger union would require the employer either to breach his collective bargaining agreement with the union, at perhaps the risk of a suit under Section 301 of the Act,[10] or else give up the contract. Or the increased

---

[8] Approximately 66 percent of all 8(b)(4)(D) charges filed in the last fiscal year grew out of the construction industry. 34 NLRB Ann. Rep. 204-205 (1969).

[9] Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. Chi. L. Rev. 389, 401 (1971).

[10] Section 301 (29 U.S.C. § 185) grants jurisdiction in any district court of the United States for suits "for violation of contracts between an employer and a labor organization".

costs of the stranger union alone may require the contractor to abandon the contract. Indeed, for these reasons, Martini Tile and Terrazzo Co., petitioner in this case, testified here that a change in its usual assignment of the work in dispute here from Tile Setters to Plasterers would deprive it of 30 percent of its annual business (A. 128).

Thus, a contractor's economic existence plainly is to a substantial degree affected by the resolution of work assignment disputes, and he is vitally interested in the outcome. Moreover, the employer's interest in factors of economy, efficiency, productivity, and the like, are consonant with the public's interest in these same factors. Accordingly, industrial realities dictate that any fair and reasonable machinery for the settling of jurisdictional disputes should take into consideration these factors. Indeed, the Second Circuit recently held as much, rejecting a contention that the NLRB in Section 10(k) determinations should adopt the standards used by the National Joint Board for the Settlement of Jurisdictional Disputes [11] in resolving such disputes. That court, finding that the Joint Board "gives little weight to considerations of economy and efficiency, and that past practice is usually held determinative",[12] affirmed the NLRB's

---

[11] This body, as shown *infra* pp. 9-11, was set up by the Building Trades Department, AFL-CIO, after Section 10(k) was enacted, to resolve jurisdictional disputes in the construction industry.

[12] This was recently affirmed by one writer drawing from Joint Board Rules and Regulations. "In structuring its awards to best serve the interests of the constituent members of the Building Trades Department, the Joint Board gives controlling weight to prior Joint Board decisions of record and interunion agreements of record. In the absence of such decisions or agreements the award is determined by the established trade practice or the prevailing area practice." Comment, *supra* n. 9, 38 U. Chi. L. Rev. 389, 401-402 (1971); Note, 77 Yale L.J. 1191, 1200-1201 n. 52, 1203-1204 (1968); *K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION* 45 (1961).

consideration of these factors, as follows (*N.L.R.B.* v. *Local 25, I.B.E.W.*, 396 F.2d 591, 594 (1968)):

> It would be surprising, indeed, to find the Board, to which is entrusted the protection of the public interest in this area as in others, completely disregarding the factors of efficiency and economy in reaching its determination as to assignment of work. Nor is there any authority for such a startling proposition as that the national labor policy, which the Board is set up to further, requires that considerations of economy and efficiency in the employment of labor be ignored.

In view of the vital interest of the employer and the public in the resolution of these disputes upon consideration of these and other adequate factors, it seems most improbable that Congress would have intended to require the NLRB to defer under Section 10(k) to any dispute-settling machinery which failed to include the employer who made the assignnment. The factors of efficiency, economy, and productivity are peculiarly within the employer's knowledge;[13] therefore, the full participation of the employer in any dispute-settling process is essential to present the evidence relevant to these factors. Indeed, this Court has held that under the Railway Labor Act it is essential to bring all the parties, the railroad and the unions involved, together to participate in the proceeding to determine the jurisdictional dispute. *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157 (1966). The Court found this essential to a fair hearing to settle such disputes, to which the "railroad, the employees, and the public, for all of whose benefit the Railway Labor Act was written, are entitled . . . ." 385 U.S. at 162.

Accordingly, considerations of industrial realities and the interests of the public compel the recognition of the employer as a party to any method of adjustment of disputes under Section 10(k) of the Act.

---

[13] Attleson, *The NLRB and Jurisdictional Disputes*, 53 Geo. L. J. 93, 111 (1964).

IV. The Contemporaneous Construction Of The Statute By Construction Industry Groups Accords With The Recognition Of The Employer As A Party To The Dispute

Prior to the time Section 10(k) was added to the Act in 1947, construction unions affiliated with the Building and Construction Trades Department utilized an inter-union "Referee" system for the purpose of the resolution of jurisdictional dispute between the member unions. This system, which was put into effect in 1936, did not provide for employer participation in any form. Some earlier dispute-settling bodies in this industry had provided for employer participation, but these met with opposition because of the employer's participation and employers were excluded from participation as parties in the "Referee" system.[14]

Section 10(k) was enacted into law on June 23, 1947, as part of the Taft-Hartley Amendments. Almost immediately thereafter, on July 9, 1947, the Building Trades Department suspended the "Referee" system. Thereafter, the Building Trades Department resumed negotiations with employer groups in an effort to devise a workable plan which would conform to the requirements of the newly enacted Sections 10(k) and 8(b)(4)(D).[15] Assistance in these negotiations was given by NLRB General Counsel Robert Denham, who strongly encouraged, on behalf of the NLRB, that employers and unions establish "some joint procedure to which both the labor organizations

---

[14] *K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB* 64-69 (1961).

[15] The Department had begun negotiations with employer groups prior to the passage of the Taft-Hartley Amendments "to find a workable way out of the difficulty." Report of President, Building Trades Department, 41st Annual Convention (Nov. 10, 1948), excerpted in Appendix 1(a) to amicus brief of Laborers' International Union.

and the members of the various employer associations would be firmly committed . . . ." [16]

On May 1, 1948, these negotiations resulted in the establishment of a Plan for National Joint Board for Settlement of Jurisdictional Disputes. This Plan was executed by employer groups, the Associated General Contractors ("AGC") and seven specialty contractors associations, and the Building and Construction Trades Department. The Plan called for the establishment of a Joint Board, with equal representation by employers and unions in addition to an impartial chairman. And the Plan expressly bound only those employers and unions who were stipulated to be bound by its determinations.[17]

Accordingly, the industry groups drafting the Joint Board Plan recognized that the employer was an indispensable party in the resolution of the jurisdictional dis-

---

[16] Address by Robert Denham, Associated General Contractors Annual Convention, Feb. 11, 1948.

[17] See *STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB* 89-99 (1961). The Plan provided (Art. V, Sec. 5):

> It is understood only those *contractors* who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO, *shall be considered as bound* by this agreement *when they have signed a stipulation* setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement. [Emphasis added].

The procedural rules of the Joint Board provide as follows (A. 343-344):

> These procedures shall apply to: (a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL-CIO, and who have signed a stipulation setting forth that they are willing to be bound by the terms of the agreement establishing the Joint Board, or who are members of a signatory association of contractors with authority to bind its members, or who are parties to a collective bargaining agreement providing for the settlement of jurisdictional disputes under the procedures herein set forth . . . .

pute, and that in the absence of an employer stipulation to be bound to the Joint Board determination, the employer was free under Section 10(k) to take the case to the NLRB even though both unions were stipulated to the Joint Board. In fact, in briefs submitted to the NLRB after almost a decade of operation, the Joint Board acknowledged that employers are "parties" to jurisdictional disputes and that the NLRB must decide cases under 10(k) where the unions involved, but not the struck employer, are stipulated to the Joint Board.[18]

This contemporaneous construction of the statute by the various industry groups, unions and employers alike, and the National Joint Board itself, lends substantial support to the construction of the NLRB that the employer is a party to the dispute within the meaning of Section 10(k).

V. The NLRB's Construction Is Not Inconsistent With The Applicable Legislative History

The NLRB's construction of the statute to conclude that the employer is a "party" to a work-assignment dispute under Section 10(k) finds clear support in the legislative history of the relevant provisions of the Act. Although there is no direct discussion in the committee reports or the floor debates as to the precise meaning of the phrase "the parties to such dispute" as used in Section 10(k), the history behind the language used in Section 8(b)(4)(D) plainly shows that Congress considered the employer to be a party to such dispute.

There was no Section 10(k), or similar provision, in the House bill. That bill flatly prohibited all "jurisdictional strikes" against an employer and granted the employer the right to enforce this prohibition through an injunction and damage suit in federal district courts. The bill defined a jurisdictional strike as any concerted interference or strike which sought to force the employer to

---

[18] See Brief for the National Joint Board at 27, 56-60, *Acoustical Contractors*, 119 NLRB 1345 (1957).

assign the work to one group of employees rather than another.[19]

Section 10(k) first appeared in the Senate bill in much the same form as it now appears in the act, but at that stage it also included a clause which authorized the NLRB to appoint an arbitrator to hear and determine those disputes leading to 8(b)(4)(D) charges. The Senate passed the bill with the arbitrator provision included in Section 10(k).[20] In Conference, the arbitrator clause was dropped and Section 10(k) took its present form, but without any discussion of the intended reach of the word "parties".[21]

Thus, the abstention provision of Section 10(k) and its reach was not discussed. As Judge MacKinnon aptly explained in his dissent in the instant case, the abstention provision of Section 10(k), and the scope of "parties" as used therein, "attracted no notice because it was always overshadowed by the provision for the Board to appoint an arbitrator." (A. 391). Accordingly, it is plain that, as Judge McKinnon further concluded in dissenting below (A. 392):

> The truth of the matter is that the legislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does.[22]

---

[19] H.R. 3020, §§ 2(15) and 12(a), 80th Cong., 1st Sess., pp. 12, 47-50, in 1 Legislative History of the Labor Management Relations Act of 1947 [hereinafter cited as "LH"] 169, 204-207 (1947).

[20] H.R. 3020 as passed by the Senate, 80th Cong., 1st Sess., pp. 81-82, 100-101, in 1 LH 239-241, 258-259 (1947).

[21] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 57, in 1 LH 561 (1947).

[22] The majority below found support from the legislative history essentially on two points. First, the court referred to a statement by Senator Morse to the effect that Section 10(k) would encourage unions to set up machinery within their own ranks for the settle-

On the other hand, the legislative history of Section 8(b)(4)(D) plainly shows Congress' recognition of the employer as a party to the dispute. Section 8(b)(4)(D), as passed by the Senate, proscribed strikes against work assignments only where unions were involved;[23] but the Conference bill broadened this language to include strikes against work assignments to unrepresented employees as well.[24] Senator Taft explained that the purpose of this language was to protect employers from strikes and picketing by unions to force the employers to assign work to union members rather than to unrepresented employees for legitimate reasons.[25]

---

ment of such controversies (A. 376-377). But in the speech quoted by the Court, Senator Morse specifically referred to the use of such machinery for "settling such disputes *short of economic action.*" (Emphasis supplied). 93 Cong. Rec. 1910-1911, in 2 LH 982-983 (1947). Senator Morse was plainly expressing the hope that the Act's proscriptions would encourage unions to resolve their differences prior to taking any strike action; his comments do not at all indicate that once strike action was taken the unions should settle the dispute among themselves without the employer's participation. In fact, the same "incentive" for unions to settle their disputes *short of economic action*, and therefore before the Act's machinery is operative, is equally present whether or not the employer is considered a party for purposes of Section 10(k).

Second, the court referred (A. 377-378) to a sentence in the House Conference Report describing 10(k) as authorizing the NLRB to determine "disputes between unions giving rise to unfair labor practices under Section 8(b)(4)(D) (jurisdictional strikes)." But this sentence may be just as easily read to support the NLRB view, for it plainly shows that 10(k) is not applicable until a strike implicating the employer has grown out of the dispute, and therefore, that three parties, the unions and the employer, are involved.

[23] That bill made it an unfair labor practice for a labor organization to strike to require the assignment of work to "members of a particular labor organization" rather than to "members of some other labor organization." H.R. 3020 as passed by the Senate, 80th Cong., 1st Sess., pp. 81-83, in 1 LH 239-241 (1947).

[24] The Conference bill was enacted into law proscribing strikes to force "an employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ."

[25] 93 Cong. Rec. 7000, in 2 LH 1624 (1947).

Thus, Congress plainly sought to subject to the Act's dispute-settling machinery work-assignment disputes between a union and an employer over the employer's assignment of particular work to its own unrepresented employees. In these circumstances, the dispute is clearly between the employer and the union. *Cf., Local 978, United Brotherhood of Carpenters* v. *Markwell*, 305 F.2d 38, 47 (8th Cir. 1962) (". . . it is clear that those sections are also applicable when the dispute might be said to be solely between an employer and a union"); *N.L.R.B.* v. *Local 25, I.B.E.W. (Sarrow-Suburban Elec. Co.)*, 383 F.2d 449, 454 (2nd Cir. 1967). And in this circumstance, the dispute being between the employer and the union, it is plain that Congress recognized the employer as one of the parties to the dispute for the purposes of Section 10(k).

Accordingly, since Congress has recognized the employer as a party for this purpose, and since there is no statutory language limiting the application of Section 10(k) to certain situations only, Congress apparently considered the employer one of the "parties to such disputes" for all purposes under Section 10(k).

VI. The NLRB's Consistent Administrative Construction For More Than Twenty Years Without Congressional Change Is Entitled to Great Weight And Should be Affirmed In The Absence, As Here, Of Compelling Reasons To The Contrary

A. *The NLRB Construction Of The Statute In The Circumstances Is Entitled To Great Weight*

As shown *supra* pp. 2-5, the NLRB construction of the statutory language in question here has been consistently adhered to by that agency for more than twenty years. From the time the issue was first directly presented to it, the NLRB has held that the abstention provision of Section 10(k) was not applicable unless the employer as well as the unions involved had agreed

upon a method of voluntary adjustment. *Los Angeles Building & Construction Trades Council (Westinghouse Elec. Corp.)*, 83 NLRB 477, 482 n. 7 (1949); *Int'l Hod Carriers Union, Local 231 (Middle States Tel. Co.)*, 91 NLRB 598, 604 (1950); *United Bhd. of Carpenters, Local 581 (Ora Collard)*, 98 NLRB 346, 349 (1952). It has consistently adhered to that construction ever since, *Local 532, United Bhd. of Carpenters (D.W. Winkelman Co.)*, 189 NLRB No. 94 (1971), without challenge by any court of appeals until the instant case.

In this circumstance, the NLRB construction of the statutory language is entitled to great weight. This Court has held on numerous occasions that a consistent interpretation of a statute by the agency charged with its administration is entitled to great weight. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), and cases cited therein. This is particularly true in circumstances as here, where the interpretation involves "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *accord*, *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965). Accordingly, the Court has held that a contemporaneous and consistent construction of the agency should not be overturned where it is a reasonable and admissible interpretation, even though there may be other reasonable interpretations of the language. *Udall* v. *Tallman*, *supra*, 380 U.S. at 18; *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583 (1930).

In addition, considerable weight should be attached to the fact that Congress has never changed the substantive or procedural provisions of the jurisdictional dispute provisions during the more than 20 years of the NLRB's

interpretation of that language, despite the fact that Congress enacted extensive revisions of the entire Act in 1959 and, in particular, rewrote most of the Section 8(b)(4) language. From this, "it is a fair assumption that by reenacting without pertinent modification the provisions with which we here deal, Congress accepted the construction placed thereon by the Board . . . ." *N.L.R.B.* v. *Gullet Gin Co.*, 340 U.S. 361, 366 (1951); *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965).[26]

For these reasons, the amici submit that the NLRB's construction of the statute here must be upheld. As shown in the preceding sections, the NLRB's construction is reasonably supported in the statutory language, history, and policies of the Act. Moreover, as we show below, the reasoning of the court below does not compel the conclusion that the NLRB interpretation is unreasonable.

B. *The Reasoning Of The Court Below Does Not Militate Against The NLRB's Construction Of The Statute*

In rejecting the NLRB's interpretation that the employer was necessarily a party to work-assignment disputes within the meaning of Section 10(k), the court below failed to comprehend the Congress' plain command

---

[26] Contrary to the court below, this Court's decision in *Boys Markets, Inc.* v. *Retail Clerk's Union*, 398 U.S. 235 (1970), does not militate against attaching persuasive significance to Congress' reenactment of Sections 8(b)(4)(D) and 10(k) without change. The Court in *Boys Market* was concerned with *stare decisis*, and concluded that the "mere silence of Congress is not a sufficient reason for refusing to reconsider the [earlier] decision." Moreover, contrary to this case, there had been no relevant statutory revisions between the decisions of the Court. Where, as here, there has been a substantial re-enactment of related statutory provisions without changing the provision involving the questioned administrative interpretation, "Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that the interpretation is the one intended by Congress." *Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965).

and intent as discussed above. Instead, the court relied upon plainly erroneous grounds to justify its contrary conclusion.

1. The fundamental error by the court below was its assumption that the jurisdictional dispute provisions were enacted by Congress to protect only "the employer who was 'neutral' in the dispute"; and that an "employer has standing under these provisions when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree" (A. 383). The court further concluded in this regard: "The purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups. The neutral employer is one who cares not how the dispute is decided but wants merely that it be decided." (A. 375).

This conclusion is plain error. The literal language of the statute contains no requirement of employer neutrality and the court below made no contention that it does. Moreover, the NLRB specifically rejected the contention that Section 10(k) applied only where the employer was neutral and indifferent to the result in the first cases brought under Sections 8(b)(4)(D) and 10(k). *Lodge 68 of the Int'l Ass'n of Machinists (Moore Drydock Co.)*, 81 NLRB 1108, 1114 (1949); *Int'l Longshoremen's and Warehousemen's Union, Local 16 (Juneau Spruce Corp.)*, 82 NLRB 650 (1949). In *Juneau Spruce*, *supra*, 82 NLRB at 656, the NLRB held in rejecting the contention:

> [I]n the absence of language specifically limiting the application of Section 10(k) to certain situations only, or even persuasive legislative history in support of such restricted application, the Board is obliged to give effect to that Section which its language requires.

Further, any doubt as to whether these provisions apply where the employer is not neutral and indifferent

was surely dispelled by the change in the language of Section 8(b)(4)(D) in Conference to protect, subject to the Act's provisions, an employer's assignment to his own unrepresented employees (*supra*, pp. 13-14). Plainly, in that situation, Congress was not merely seeking to protect a neutral plagued by two unions who cannot agree, but was protecting, subject to a 10(k) determination, the employer's active interest in assigning work to a particular group of his own employees.

Finally, as shown above (pp. 5-8), as a matter of industrial reality the employer is seldom neutral and indifferent to the resolution of the dispute, but instead has a vital interest in the assignment of work to a particular group of employees. In the absence of dispositive legislative history to the contrary, it must be assumed that Congress recognized that reality and sought to give effect to the protection of that interest under the statutory scheme.[27]

2. The court below sought to supports its interpretation from the text of Section 10(k). The court's basic conclusion (A. 371) was that the words "the parties to such dispute" in 10(k) referred to the parties to the underlying dispute, which the court found to be the rival unions. However, this conclusion ignores the facts, as discussed above (pp. 13-14), that the underlying dispute in some cases, as Congress recognized, is between one union and the employer, and that the "dispute out of which such unfair labor practice shall have arisen" (the statutory language) is the dispute which causes a union to strike because the employer failed to acquiesce in the union's request for the assignment to its members.

---

[27] See Comment, *supra* n. 7, 38 U. Chi. L. Rev. 389, 397-398 (1971), where the court's neutrality requirement, after examination in detail, was found wanting. The author concluded: "The lack of significant legislative or executive comment on the neutrality issue makes it difficult to escape the conclusion that the problem was never really considered in the 10(k) context."

In addition, the court argued (A. 371) from the statutory language that Congress could easily have made the employer a party, if that had been its intent, by express language. But this argument carries no persuasive impact for the court's view: Congress could also have written Section 10(k) so as to limit the necessary parties specifically to the rival labor groups involved, but it failed to do so. The failure of Congress to make its intent clear by express language provides no proof of intent either way.

Also, the court found "persuasive evidence" for its interpretation in the fact that the employer is not bound under the Act to follow a 10(k) determination (A. 371). But the scheme of the Act does not bind any of the parties to a 10(k) determination. A union which exerts strike pressure in the face of an adverse 10(k) determination can have the 10(k) award applied against it only through an order under Section 8(b)(4)(D), which would require that the picketing cease and desist. But the same economic sanction is available against the employer where he chooses to ignore a 10(k) determination, for there the union receiving the favorable award can freely strike or picket that employer without violating Section 8(b)(4)(D). See *Local 502, Int'l Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963). Accordingly, the employer is bound in a very meaningful sense.

3. The court below also found support for its position in the NLRB's *Safeway* doctrine (A. 383-384). In *Safeway* and similar cases,[28] the NLRB has dismissed a 10(k) proceeding upon finding that one of the unions has renounced any claim to the work in question. This practice does not indicate that the NLRB has accepted a voluntary adjustment by the unions, but rather indicates that a necessary requisite of a jurisdictional dispute—

[28] *Teamsters Local 107 (Safeway Stores, Inc.)*, 134 NLRB 1320 (1961); *Local 1905, Carpet Linoleum Layers (Butcher and Sweeney Constr. Co.)*, 143 NLRB 251 (1963).

the existence of conflicting claims to the work—is absent. Under this doctrine the NLRB does not bind the employer to assign the work to the non-renouncing union; the employer may well assign the work to a third group of employees.

Thus, the NLRB's *Safeway* doctrine does not lend support to the court's view that the employer is not a necessary party to a jurisdictional dispute within Section 10(k). The NLRB has applied this doctrine to determine whether in fact a jurisdictional dispute exists, *i.e.*, whether there is a real dispute;[29] it provides no support for determining whether the employer should be a party to the resolution once a real dispute is found to exist.

4. Nor is the court's position aided by its reliance upon "the general principle that full scope should be given to voluntary arbitration procedures" (A. 381). The question here is not whether arbitration is desirable, but who should be a party to the arbitration. Plainly, arbitration is not desirable where it would have a direct effect on the interests of a person not a party to the arbitration. See *Retail Clerks Local 770* v. *Thrifty Mart*, 59 Cal. 2d 421, 423-424, 380 P.2d 652, 655-656 (1963) (holding, per J. Traynor, that there can be no "valid arbitration award in the absence of a party directly affected by the award"); *Retail Clerks Local 428* v. *L. Bloom & Sons*, 173 Cal. App. 2d 701, 703, 344 P.2d 51, 52-53 (1959).

Moreover, the NLRB's interpretation does give full scope to voluntary arbitration within the meaning of this Court's decision in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261 (1964). The NLRB position in no way pre-

[29] The NLRB and the courts have applied the *Safeway* doctrine narrowly. Explicit disclaimers have been held non-dispositive in circumstances which inferentially belie the disclaimer. *See Local 1291, ILA*, 152 NLRB 676 (1965), *enforced*, 368 F.2d 107 (3rd Cir. 1966) (disclaiming union had a contract with the employer covering the work); *Plumbers Local 525*, 173 NLRB No. 208 (1968) (disclaiming employees continue to do the work).

cludes the unions involved from attempting to resolve the dispute through binding arbitration procedures such as the National Joint Board. And indeed, resort to such arbitration may well resolve the dispute even though the employer is not included in the arbitration procedure or bound to the result.[30] But even if the arbitration procedure does not resolve the dispute, *Carey* recognizes that the policy favoring arbitration does not preclude the NLRB from determining the issue. 375 U.S. at 272.

5. Finally, the weakness of the court's analysis is shown by its hedging acknowledgment that its position might not apply in a situation where the voluntary adjustment proceeding failed to make "realistic provision for meaningful attention to the interest of the employer, and to questions of efficiency". (A. 384-385 and n. 27). This statement is wholly inconsistent with the court's positive assertions throughout its opinion that Congress' *intent* in 10(k) was to protect the neutral employer from the quarreling unions and that this was "fully served by any binding settlement between the disputing employee groups." (A. 375).

In any event, there is serious question as to the accuracy of the court's conclusion that the National Joint Board does make "realistic provision for meaningful attention to the interests of the employer and to questions of efficiency" and is therefore the kind of "private-ordering mechanism for the resolution of jurisdictional disputes" permissible under its view of the Act to require the NLRB to abstain from asserting jurisdiction under 10(k). The Second Circuit has found to the contrary that the "Joint Board gives little weight to considerations of economy and efficiency, and that past practice is usually held determinative." *N.L.R.B.* v. *Local 25, I.B.E.W.*,

---

[30] For example, the employer may recognize the wisdom of the arbitral determination and abide by it. Or, the determination may be against the striking union and the union relinquishes its claim for the work.

396 F.2d 591, 594 (1968). Commentators have made the same point. See *K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION* 45 (1961); Comment, *supra* n. 9, 38 U. Chi. L. Rev. 389, 401 (1971) (". . . its decisions tend to reflect purely union interests."); Note, *The NLRB and Deference to Arbitration*, 77 Yale L.J. 1191, 1200-1201 n. 52 (1968).

Thus, Joint Board determinations are often made by reliance upon ancient and outmoded inter-union agreements and decisions of record, some dating back to early 1900's. Indeed, in this case, the Joint Board award was made in reliance upon a 1917 agreement between the International Unions involved and a 1924 decision interpreting the agreement (A. 316, 341-342), although the dispute involved a method of applying tile which was developed in recent years (A. 18-19, 110, 363).

As a result of this practice and the failure to heed essential managerial considerations, many employer groups, including the Associated General Contractors which had a primary responsibility in negotiating the first Joint Board,[31] have now withdrawn from the Joint Board Plan. None of the associations participating in this amicus brief are stipulated to the current Joint Board.

Thus, the court plainly erred in concluding that the Joint Board meaningfully takes into account managerial factors of economy and efficiency. This error is of sig-

[31] The AGC and seven specialty contractor associations were the first employer groups stipulated to the Joint Board procedures. This Joint Board Plan terminated in 1969 when the AGC and four specialty contractor associations were unable, after lengthy negotiations, to secure certain reforms in the existing plan. The AGC later refused to become signatories to a new Joint Board Plan which went into effect on April 3, 1970. Other specialty contractor associations including International Association of Wall and Ceiling Contractors, Mason Contractors Association, and National Roofing Contractors Association, amici here, withdrew years earlier, as did the Tile Contractors Association, petitioner in No. 1231.

nificant importance, for it emphasizes what the court itself plainly indicated (A. 384-385), *i.e.*, that there is doubt as to whether its analysis should apply in the face of a voluntary adjustment procedure that is "subject to an infirmity that undercut its fairness and reliability . . ." (A. 384). This admission of doubt itself undermines the court's entire analysis, for neither the language of the Act nor its legislative history indicates that the work-assignment dispute provisions should be interpreted differently as differing circumstances appear. Moreover, the error highlights the plain fact that an employer has a direct interest in the resolution of work assignment disputes upon consideration of relevant managerial factors, and any controlling resolution of that dispute without his participation is subject to the infirmity of fundamental unfairness. See *Retail Clerks Local 770* v. *Thrifty Mart*, 59 Cal. 2d 421, 423-424, 380 P.2d 652, 655-656 (1963). Accordingly, the NLRB's construction of the Act to require the employer to be bound to any voluntary adjustment of the dispute under the abstention provision of 10 (k) is plainly preferrable to the court's analysis in that it provides substantive protection for all parties in interest involved in the dispute, and thereby comports with the requirements of fundamental fairness.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

JOSEPH M. STONE
815 Fifteenth Street, N.W.
Washington, D. C. 20005

GEORGE L. PLUMB
135 South LaSalle Street
Chicago, Illinois 60603

BETTY SOUTHARD MURPHY
Suite 1032; Pennsylvania Building
13th & Pennsylvania Avenue, N.W.
Washington, D. C. 20004

May 27, 1971